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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958.

No. 176.

HARRY J. ALKER, JR.,

Petitioner,

GIRARD TRUST CORN EXCHANGE BANK AND FLORENCE FISHER DUNWOODY, EXECUTORS UNDER THE WILL OF MAMIE DU BAN, Deceased.

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

FRANK F. TRESCOTT,
[illegible] Land Title Building,
Philadelphia 10, Pa.,
Counsel for Petitioner.

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GIRARD TRUST CORN EXCHANGE BANK AND FLORENCE FISHER DUNWOODY, EXECUTORS UNDER THE WILL OF MAMIE DEBAN, DECEASED.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

Petitioner prays that this Court grant a rehearing of its order of October 13, 1958, denying the petition for writ of certiorari and that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania in the above entitled case as prayed for in the petition filed July 15, 1958, herein.

Reasons for Granting Rehearing and Issuing the Writ.

1. An important question on the fundamental right to a hearing appropriate to the nature of the case under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution is involved here.

2. The Courts of the Commonwealth of Pennsylvania have deprived your petitioner of property by entering and sustaining a judgment in excess of $150,000.00 against him, without affording him the opportunity to appear in court not only to be heard, but to properly prepare his defense.

3. The trial court in proceeding to trial without the defendant in the face of uncontradicted medical testimony of physical incapacity conducted little more than an ex parte hearing. *Etta v. Middleton*, 62 A. 2d 371 (M. C. D. C. 1948). The refusal of a continuance when uncontradicted medical testimony was presented constituted reversible error, especially where there was no showing that the continuance would have resulted in serious loss to other parties, *Harrah et al. v. Morgenthau*, 89 F. 2d 863 (1937); *Carmack v. Commonwealth*, 118 F. 2d 396 (1941).

4. On appeal to the Supreme Court of Pennsylvania that court by handing down a per curiam opinion not only ignored this important question, but also a question of first impression in that jurisdiction involving the waiver of incompetency as to the admissibility of evidence which would probably have changed the results of the case had it been admitted.

5. A suit is pending, and was prior to the death of Respondents' decedent, in the United States District Court for the Eastern District of Pennsylvania between the Federal Deposit Insurance Corporation, as plaintiff, to the use of Butcher & Sherrerd and Fidelity Philadelphia Trust Company; and the DuBan Estate and the petitioner, here as defendants, in which proceeding it is contended by the DuBan Estate and petitioner that the stock involved in this proceeding, among other assets, had been illegally converted by the Federal Deposit Insurance Corporation, and they demanded its return to the DuBan Estate and petitioner. The Respondents were fully acquainted that this action was and is pending, and that the Respondents' decedent had up to the time of her death participated in the said proceeding and signed all pleadings therein. This is certainly confirmatory of the alleged agreement with the petitioner, the existence of which had been testified to by Respondents' decedent's sister in law and contended by petitioner.

6. That the Respondents' position in attempting to prosecute before this Court and the Court below their alleged claim against petitioner is untenable by reason of the fact that the Respondents appeared before the Estate Tax Division of the Internal Revenue Service in the Estate of Mamie DuBan, Respondents' decedent, and represented to the said Service that the alleged claim had no value (even though Respondents had in their possession certain valuable property belonging to petitioner which they alleged they held as collateral for their alleged claim) and the Internal Revenue Service by reason of the said allegations by Respondents, and after investigation, found the value of the alleged claim was zero (R 336-7). In view of the fact that the Respondents had the above assets which they claimed to be collateral, the Internal Revenue Service could only have so found if it came to the conclusion that the alleged claim was without foundation or merit.

Conclusion.

The sole purpose of our judicial process is to dispense justice. Without a full and fair hearing, the courts must fail of this purpose. For the above reasons, therefore, and the reasons set forth in the petition for certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing a writ of certiorari issue to the Supreme Court of the Commonwealth of Pennsylvania.

FRANK F. TRUSCOTT,
Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 of the Rules of this Court.

FRANK F. TRUSCOTT,
Counsel for Petitioner.